

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB's 286, 722, & 1074

SPONSOR: Criminal Justice Committee, and Senators Campbell, Silver, and Hargrett

SUBJECT: Criminal Use of Personal Identification Information

DATE: March 17, 1999 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>White</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The committee substitute (CS) for Senate Bills 286, 722, and 1074 creates s. 817.568, F.S., for the purpose of specifically criminalizing the use of another's personal identification information for fraudulent or harassment purposes. The CS would provide that it is a third degree felony for a person to willfully and without authorization fraudulently use or possess with the intent to fraudulently use an individual's personal identification information without first obtaining the individual's consent. Moreover, the CS would provide that it is a first degree misdemeanor for a person to willfully and without authorization possess, use, or attempt to use an individual's personal identification information, without first obtaining that individual's consent, for the purpose of harassing the individual.

Although the existing statute generally embraces theft offenses by fraud, the statutes do not specifically address mere possession of an individual's personal identification information with the intent to fraudulently use, nor do they specifically address harassment by possession or use of an individual's personal identification information.

The CS creates section 817.568, F.S., and reenacts the following sections of the Florida Statutes: 464.018, 772.102, and 895.02.

## II. Present Situation:

### Theft by False Personation

Section 817.02, F.S., proscribes a person from falsely personating or representing another in order to receive property intended for the other which the person then converts to his or her own use. This offense is punishable as a theft offense in s. 812.014, F.S., and depending upon the value of the property stolen, the offense is a first, second or third degree felony, or a first or second degree misdemeanor.

### **Uttering**

Section 831.02, F.S., proscribes the offense of uttering, a third degree felony, which is committed when a person passes or offers to pass as true a document that the defendant knew to be false or altered, and the defendant intended to injure or defraud another person.

### **Forgery**

Section 831.01, F.S., proscribes the offense of forgery, a third degree felony, which is committed when a person falsely makes, alters, forges or counterfeits a document with the intent to injure or defraud another person.

### **False Statement to Obtain Credit or Property**

Section 817.03, F.S., provides that it is a first degree misdemeanor to make a false written statement about one's assets or liabilities with the fraudulent intent to obtain credit or property. Section 817.59, F.S., provides that it is a first degree misdemeanor to make a false written statement, including the giving of a false identity, with the intent that it be relied on for the purpose of obtaining a credit card.

### **Florida Communications Fraud Act**

Section 817.034, F.S., creates the offense of "organized fraud" in order to proscribe a person from engaging in a scheme to defraud that causes the offender to obtain property. This offense is punishable as either a first, second, or third degree felony depending upon the amount of property obtained.

### **Credit Card Fraud**

Sections 817.60 and 817.61, F.S., provide that theft of a credit card is a first degree misdemeanor, and that fraudulent use of a credit card is either a first degree misdemeanor or a third degree felony, depending on the number of times the credit card was used and the amount of purchases. Fraudulent use of a credit card occurs when a person with intent to defraud the credit card issuer or a seller uses a credit card to which he or she is not entitled for the purpose of obtaining anything of value.

## **III. Effect of Proposed Changes:**

The CS creates s. 817.568, F.S., to specifically prohibit the criminal misuse of personal identification information. Personal identification information is broadly defined as any name or number that may be used to identify a specific individual, including any:

- ◆ Social security number, date of birth, driver's license or identification number, alien registration number, passport number, employer or taxpayer identification number, or food stamp account number;

- ◆ Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- ◆ Unique electronic identification number, address, or routing code; or
- ◆ Telecommunication identifying information or access device, which is any object, number, or other means of account access that can be used to obtain any thing of value, or to initiate a transfer of funds.

In s. 817.568(2), F.S., the CS makes it a third degree felony for a person to willfully and without authorization fraudulently use or possess with the intent to fraudulently use an individual's personal identification information without first obtaining the individual's consent. Fraud is not defined in the CS, but has been held to mean, "[a]n intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." *Long v. State*, 622 So.2d 536, 538 (Fla. 1st DCA 1993). This provision of the CS has the effect of broadening the scope of conduct proscribed by current statute. While current law proscribes fraudulent use of identification information in many cases, it does not proscribe mere possession of this information.

In s. 817.568(3), F.S., the CS makes it a first degree misdemeanor for a person to willfully and without authorization possess, use, or attempt to use an individual's personal identification information, without first obtaining that individual's consent, for the purpose of harassing the individual. The CS defines "harass" as conduct, which serves no legitimate purpose, directed at a specific person with the intent to cause substantial emotional distress. Constitutionally protected conduct is specifically excepted. Examples of the type of conduct this offense would proscribe include:

- ◆ harassment of an individual by using the individual's name, address, or social security number to apply for credit cards and loans; and
- ◆ harassment of an individual by posting the individual's name and credit card account information on the Internet or in other places accessible by the public.

In either of the aforementioned hypotheticals, the proscribed conduct may not necessarily result in convictions under current law because the conduct might not result in either a tangible benefit to the violator, or in measurable loss to the victim. However, under s. 817.568(3), F.S., such conduct would be penalized if it resulted in causing substantial emotional distress.

The CS further provides that the section does not apply to any lawful investigative, protective or intelligence activity by law enforcement, that a court may order a defendant to pay restitution to any victim, that the sentencing court may issue any orders necessary to correct any public record that contains false information given in violation of the section, and that prosecution of violations of the section may be brought by the state attorney or statewide prosecutor.

Finally, the CS reenacts s. 464.018, F.S., relating to disciplinary actions for violations of the Nurse Practice Act, s. 772.102, F.S., relating to the definition of "criminal activity" with respect to the Civil Remedies for Criminal Practices Act, and s. 895.02, F.S., relating to the definition of

“racketeering activity,” for the purpose of providing cross references to the new statute created by the CS.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

The Criminal Justice Estimating Conference has not yet determined the prison bed impact of this CS; however, the Conference has considered SB 286, which provides for identity theft offenses which are somewhat similar to this CS, and has projected that SB 286 will have an insignificant prison bed impact.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

The Florida Supreme Court has held that absent an expression of legislative intent to the contrary, the specific fraud offenses criminalized in ch. 817 may constitute degrees of the general theft offenses provided for in ch. 812, known as the Anti-Fencing Act. *State v. Thompson*, 607 So.2d 422 (Fla. 1992), *adopting, Thompson v. State*, 585 So.2d 492 (Fla. 5th DCA 1991). As a result, even where the ch. 817 fraud offense and ch. 812 theft offense are different because each has an

element the other one lacks, the courts have held that a single act of criminal fraud can only be prosecuted under either ch. 812 or ch. 817, and not both. *Id.*

For example in *State v. McDonald*, 698 So.2d 849 (Fla. 2d DCA 1997), McDonald, who was employed by Burdines Department Store, used a customer's credit card, without authorization, to obtain \$360 worth of store merchandise. Based on this one act, McDonald was charged with both fraud by a person authorized to provide goods or services, s. 817.62, F.S., and grand theft, s. 812.014, F.S. On appeal, the Court held that McDonald could not be charged with both offenses because, even though the elements of the two offenses were different, the specific theft crimes in ch. 817 are a degree of the general theft crimes in ch. 812. *See Thompson*, 585 So.2d at 494 (barring concurrent prosecution for sale of a counterfeit substance, s. 817.563, F.S., and for felony petit theft, s. 812.014(2)(d), F.S., based on the same act).

Consequently, in the event the third degree felony offense created by this CS in s. 817.568, F.S., entails theft by fraud, the courts may hold that a single act of this offense may only be prosecuted by one charge based on either ch. 817 or ch. 812. In this instance, it would then be the prosecutor's prerogative to choose which chapter under which to prosecute. *See State v. Cogswell*, 521 So.2d 1081, 1082 (holding that the prosecutor has the discretion to prosecute conduct, which is proscribed by both a misdemeanor statute and a felony statute which have identical elements, as the felony); *Seybel v. State*, 693 So.2d 678 (Fla. 4th DCA 1997).

If the legislature's intent, however, is to allow a charge under both ch. 817 and ch. 812, i.e., to allow conviction and punishment for both a s. 817.568, F.S., violation and a ch. 812 violation based on the same act, staff suggests the following amendment to the CS:

(7) This section is supplemental to all other provisions of law contained in Chapter 812.

Moreover, in the event the legislature additionally intends to make a violation of s. 817.568, F.S., supplemental to all of the other fraud offenses proscribed in ch. 817, which may also embrace the misconduct proscribed by s. 817.568, F.S., staff suggests the following amendment to the CS:

(7) This section is supplemental to all other provisions of law contained in Chapter 812 and Chapter 817.

*See M.P. v. State*, 682 So.2d 79 (Fla. 1996)(convictions for carrying a concealed weapon and possession of a firearm by a minor based on the same act did not violate double jeopardy because the legislature expressly indicated in the statute that possession of a firearm by a minor was supplemental to all other provisions of law relating to possession, use, or exhibition of a firearm).

## VIII. Amendments:

None.